

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND JOINT APPENDIX**

381

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

*United States Court of Appeals
for the District of Columbia*

—
No. 9150
—

FILED DEC 11 1945

Joseph W. ...

CLERK

FEHLHABER PILE COMPANY, INC., *Appellant,*

v.

TENNESSEE VALLEY AUTHORITY, *Appellee.*

—
**Appeal from the District Court of the United States
for the District of Columbia.**
—

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9150.

FEHLHABER PILE COMPANY, INC., *Appellant*,

v.

TENNESSEE VALLEY AUTHORITY, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

This appeal is by the plaintiff below from a judgment and order of the United States District Court for the District of Columbia (Maguire, J.), granting the motion of the defendant below to quash the return of the service of the summons and to dismiss the complaint (App. 14). The motion was made on the claim that the appellee is neither a

resident of nor engaged in business in the District of Columbia and on the further ground that under the provisions of *Section 8a of the Tennessee Valley Authority Act of 1933*, as amended, (*48 Stat. 58 (1933), U. S. C. A., Title 16, Sec. 831, et seq., (1940)*) the defendant can be sued only in the northern judicial district of Alabama (App. 15).

The appellant sues to recover the damages sustained by it as a result of the breach by the appellee of a written contract for the raising and extension of a railroad bridge over the Tennessee River (App. 1). Process was served in the District of Columbia on the person in charge of the office maintained there by the appellee. The District Court accordingly had jurisdiction over the appellee (*Act of February 27, 1877, 19 Stat. 253, as amended, and as incorporated in the Code of the District of Columbia, Title 11, Section 306*).

The judgment and order appealed from are final and are subject to review by this Court, (*Act of February 9, 1893, C. 74, 27 Stat. 434, as amended, and as incorporated in the Code of the District of Columbia, Title 18, C. 2, Section 26.*)

The record indicates that the appellee is a federal corporation incorporated and existing under and by virtue of the laws of the United States (*48 Stat. 58 (1933), 16 U. S. C. A., Sec. 831, et seq. (1940)*) and that it at all times, maintains a permanent office in the District of Columbia with a staff of eight employees. (App. 16).

It will hereinafter be demonstrated (Point 11, *Infra.*) that the maintenance of this office in the District of Columbia is essential to the proper performance of the duties imposed on the appellee by the act of its creation. In addition to the performance of these statutory duties, the appellee has admitted (App. 16) that the Washington office is maintained:

- “1. To obtain information concerning all matters in the Capital which may affect the Authority * * * and to convey such information to the General Manager and members of the Board of Directors.”

- “2. To provide information relating to the Authority and to interpret and explain its programs and policies to interested representatives of the Government, * * *.”
- “3. To arrange, as required, meetings between T V A officials and employees and officers and employees of other departments and agencies of the Government and *to represent the Materials Division in the purchase of office supplies, materials and technical services from other Government agencies* * * *.”
- “4. To provide space, information and office service for the Board, General Manager and T V A officials generally when in the Capital.”

STATEMENT OF POINTS.

1. The Tennessee Valley Authority, being a corporation created by act of Congress, is a citizen of the entire United States and may be sued wherever it is doing business.
2. The Tennessee Valley Authority is engaged in business in the District of Columbia.
3. *Section 8a of the Tennessee Valley Authority Act of 1933* does not restrict jurisdiction of suits against the Authority to the northern judicial district of Alabama.

SUMMARY OF ARGUMENT.

The Tennessee Valley Authority was created by act of Congress and it is thus a citizen of the entire United States. That being so, it is subject to suit in any state or territory of the United States in which it is doing business.

The Tennessee Valley Authority Act of 1933, far from limiting the duties of the Authority to flood control work in the Tennessee River and Mississippi River Basins, has imposed numerous other statutory duties upon the appellee for the proper performance of which the maintenance of an office in the District of Columbia is essential. The record

(App. 16) indicates that the appellee maintains a *permanent* office in the District of Columbia with a staff of eight employees and that it performs functions in addition to the mandatory duties imposed upon it by statute. Furthermore, the Authority is a Government agency and it must be presumed that the office maintained by it in the District of Columbia is used in the conduct of its business, unless we are to assume that it is squandering public funds.

Section 8a of the *Tennessee Valley Authority Act of 1933* is merely a venue statute and does not vest exclusive jurisdiction of suits by or against the Authority in the northern judicial district of Alabama. The sole effect of this section is to enable the appellee, in the event it is sued in any local court, to remove the action to the United States District Court in the district in which it is sued, on the ground of diversity of citizenship. Such removal could not be accomplished on the ground that because the appellee is a federal corporation, the controversy arose under the laws of the United States, as *Title 28, Section 42, U. S. C. A.*, has divested the district courts of jurisdiction of any action by or against such a corporation, unless the United States Government is the owner of more than one-half of the capital stock of such corporation. The appellee does not come within this exception as the act of its creation has not provided for the issuance by it of any capital stock.

ARGUMENT.

Point I.

The Tennessee Valley Authority, Being a Corporation Created by Act of Congress, is a Citizen of the Entire United States and May be Sued Wherever it is Doing Business.

The appellee was created by the *Tennessee Valley Authority Act of 1933* (C. 32, 48 Stat. 58, as amended, *U. S. C. A. Title 16, Sec. 831, et. seq. (1940)*) as a body corporate; being a federal corporation, it is to be deemed a

citizen of the entire United States and subject to suit in any state or territory in which it is engaged in business. In *Van Dresser v. Oregon Railway Company*, (C. C. Wash.) 48 Fed. 202 (1891), the Court was presented with the question as to whether it had jurisdiction over a federal corporation whose principal place of business was outside the State of Washington; the Court, in sustaining its jurisdiction, stated:

“This corporation is a creature of Congress, and is within the territorial limits of this State, transacting business under and by virtue of national authority. It is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution. 2 Mor. Priv. Corp. & 984. *I hold that it is liable to be sued in the national Courts in any district wherein it may be found doing business, and having an agent or representative upon whom service of process can be made.*” (Italics supplied)

To the same effect see, *Bacon v. Federal Reserve Bank*, (D. C. Wash.) 289 Fed. 513, (1923).

Point II.

The Tennessee Valley Authority is Engaged in Business in the District of Columbia.

As has heretofore been indicated, the record contains the affidavit of the appellee's Washington representative, who is in charge of its Washington office, in which she set forth the functions of that office (App. 16). An examination of the *Tennessee Valley Authority Act of 1933* discloses that flood control work in the Tennessee River and Mississippi River Basins is but one of the appellee's functions and that the act has imposed upon its numerous other duties for the proper performance of which the maintenance of an office in the District of Columbia is essential. *Section 5* of this act, authorizes the Authority—

- “(a). To contract with commercial producers for the production of such fertilizers or fertilizer materials as may be needed in the Government’s program of development and in production in excess of that produced by Government plants * * *.”
- “(b). To arrange with farmers and farm organizations for large scale practical use of the new forms of fertilizers * * *.”
- “(c). To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners for the use of new forms of fertilizer or fertilizer practices * * * and for promoting the prevention of soil erosion * * *.”
- “(d). * * * to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients * * *.”
- “(h). To establish, maintain and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, * * *.”
- “(j). Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.”

The Act further discloses that the appellee is required:

1. To request the assistance and advice of the Executive Department and of any other independent office of the United States, and that so far as practicable, it must utilize the services of such offices (Sec. 5 (i)).
2. To file, each year, with the President and with the Congress a financial statement and complete report of its business transactions (Sec. 9 (a)) and that these transactions must be audited each year by the Comptroller General (Sec. 9 (b)).

3. To report to the Congress annually as to its operations under Section 13 of the Act, and from time to time under Section 14 of the Act.
4. To have certain transfers and leases of realty approved by the Congress (Sec. 4k (c)) and others by the President (Sec. 4k(c)).

From the above, it is apparent that the office which the appellee maintains in the District of Columbia is essential to the proper performance of its duties. The appellee is a Government agency, and it must be presumed that this office is maintained solely for the conduct of its business and has no other purpose, unless we are to assume that it is squandering public funds. (*United States v. Johnson*, (C. C. A. 10th), 87 Fed. (2d) 155; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, (D. C. Tenna.) 21 Fed. Supp. 947).

Upon the facts appearing in the record, even were the appellee a private corporation, under the authorities, there is no question that it would be held to be doing business in the District of Columbia and subject to suit in its Courts. (*Washington-Virginia Ry. Co. v. Real Estate Co. of Phila.*, 238 U. S. 185; *Haskell v. Aluminum Co. of America*, 14 Fed. (2d) 864; *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218; *Frene v. Louisville Cement Co.*, 134 Fed. (2d) 511; *Ferguson Contracting Co. v. Coal & C. R. Co.*, 33 App. D. C. 159; *Wendell v. Holland American Line*, 40 App. D. C. 1.)

The decision as to whether or not a defendant corporation is in the jurisdiction and so there subject to suit, is dependent upon the facts presented to the Court, in the particular case involved. The factual situation presented controls the determination, as was said in *St. Louis S. W. R. Co. v. Alexander*, *supra* (p. 227) :

"This Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what

constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is sued, and in which it is bound to appear when a proper agent has been served with process." (Italics supplied)

In that case the defendant, a Texas corporation, had an office in the Southern District of New York where the suit was brought; the proof disclosed that it had its name on the door of an office in that district, and that the agent in charge of that office, was its freight agent, who there adjusted claims against it. Holding that this was sufficient to render the defendant subject to process in that jurisdiction, the Court said:

"In this situation we think this was the transaction of business in behalf of the Company—by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

In *Ferguson Contracting Co. v. Coal & C. R. Co.*, *supra*, the defendant, a West Virginia corporation, owned and operated a railroad wholly in West Virginia; the situation presented in that case, was thus stated by this Court (p. 161):

"It has at no time constructed or operated any railway in the District of Columbia, or owned any property therein, or sold tickets, received freight, issued bills of lading, or solicited business of any kind or character within the District."

This Court found, however, that the defendant's President and certain of its other officers spent the winter months in the District of Columbia, and for that purpose had rented a small office in the District, for which, part of the rent was

paid by the defendant, and part by its President, because he used it for some of his personal business; this Court further found that the name of the defendant was on the building directory, and that work for the defendant, such as opening bids for construction and holding conferences, took place in this office. Ruling that this brought the defendant within the jurisdiction, so as to subject it to process, this Court said (p. 170):

"It is true that the industrial operations of the defendant were conducted entirely without the limits of the District of Columbia. It sold no tickets therein for the transportation of persons, and entered into no contracts for the carriage of goods. But it did maintain an office in the City of Washington, in which were to be found, for the greater part of each year, its President, Secretary and Treasurer, who there transacted business incidentally relating to the corporate purposes, and important to the success of its industrial operations." (Italics supplied)

Assuredly, the recital in the affidavit of Marguerite Owen (App. 16) as to the appellee's activities in Washington, without even taking into consideration

- (a) that it is a governmental agency,
- (b) its powers, duties and obligations, as set forth in the law of its creation, and
- (c) the other facts as to its activities in Washington, set forth in the opposing affidavit,

presented activities of the appellee within this jurisdiction, far more regular and extensive, than those found in the *Ferguson* case (*supra*) as adequate to confer jurisdiction upon the courts of the District of Columbia.

Point III.**Section 8a of the Tennessee Valley Authority Act of 1933
Does Not Restrict Jurisdiction of Suits Against the
Authority to the Northern Judicial District of Alabama.**

The *Tennessee Valley Authority Act of 1933* provides in *Section 4b* that the Authority "May sue and be sued in its corporate name." No other or further restriction on the right of the appellee to sue or be sued is to be found in the act of its creation. Identical language was used in the act authorizing the creation of the Inland Waterways Corporation and jurisdiction was assumed in suits against it in both State and Federal Courts. (*Inland Waterways Corporation v. Hallet and Carey Co.*, 52 Fed. (2d) 13 (C. C. A. 8th, 1931); *Inland Waterways Corporation v. Standard Commercial Tobacco Co., Inc.*, 65 Fed. (2d) 715, (C. C. A. 5th, 1933); *Inland Waterways Corporation v. Sloss Sheffield Steel and Iron Company* (Supreme Court of Alabama, 136 So. 849.

Reliance was placed by the appellee in the Court below on *Section 8a* which reads as follows:

"The corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits."

The purpose and meaning of this section is obvious. It does not limit or circumscribe the effect of *Section 4b*. It merely makes the Authority "an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States, relating to the venue of civil suits." In other words, the Section is merely a venue statute and not a statute limiting the jurisdiction of the courts.

In *Tennessee Valley Authority, et al. v. Tennessee Electric Power Company, etc.*, (C. C. A. 6th, 1937), 90 Fed. (2d)

885 Cert. denied 301 U. S. 710, the identical contention was urged by the appellee and decided against it. That case was instituted against the Authority in the Chancery Court of Tennessee and on its petition was removed to the District Court for the Eastern District of Tennessee. The appellee then moved in the District Court to quash the service of the subpoena on the ground that *Section 8a* deprived the Tennessee Courts of jurisdiction; the Circuit Court of Appeals, in affirming an order of the District Court denying this challenge to its jurisdiction, stated:

“Jurisdiction must, of course, be first examined. The Tennessee Valley Authority is a public agency. By the terms of the statute creating it, its domicile is in Alabama. Therefore it is asserted that under the laws of Tennessee actions against it are local and not transitory, and may be brought only in a Court of competent jurisdiction at the place of its domicile, * * *. Section 4 of the Tennessee Valley Authority Act (as amended, 16 U. S. C. A. & 831c) specifically provides that the corporation may sue and be sued in its corporate name. This provision is without qualification. Section 8(a), 16 U. S. C. A. & 831g (a) is as follows: ‘The corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama, within the meaning of the laws of the United States relating to the venue of civil suits.’

* * * *

The present suit was begun in a state court of Tennessee. Under the authority of section 28 of the Judicial Code, (28 U. S. C. A. & 71) it was removed to that United States District Court within the jurisdiction of which the state court action was pending. * * * No question of Federal jurisdiction here arises by virtue of Section 8(a) of the T. V. A. Act (16 U. S. C. A., & 831g (a)) and the laws in respect to venue.

While venue is waived by removal of a cause from a state into a federal court, want of jurisdiction in the state court is not cured thereby, but may be asserted

after the removal is consummated. (Citing cases)
* * *

The Tennessee Valley Authority has no restricted situs. * * *. Residence is not synonymous with situs and the act creating the Authority is replete with provisions pointing to its mobility and the transitory character of its activities. * * *. The state court had jurisdiction, and the court below acquired it by removal. * * *” (Emphasis supplied).

In *Morgan v. Tennessee Valley Authority*, (D. C. Tenn.), 28 Fed. Supp. 732, aff’d. 115 Fed. (2d) 990, the identical question was again presented; there, likewise, an action was brought against the Authority in the Chancery Court of Tennessee and removed by it to the District Court for the Eastern District of Tennessee. The Court, in overruling the Authority’s challenge to its jurisdiction, stated:

“The question of jurisdiction would merit consideration and a discussion of the pertinent authorities, but for the fact that the case of *Tennessee Valley Authority, et al. v. Tennessee Electric Power Company*, (6th Cir.) 90 Fed. (2d) 885, 887, in an opinion written by Judge Simons, passes upon the question. * * *.

* * * *

Nothing further need be said with reference to the question of jurisdiction, since this case, with which I fully agree, is controlling upon this court. * * *”

The Circuit Court of Appeals for the Fifth Circuit, in *Alabama Power Company v. Tennessee Valley Authority*, 92 Fed. (2d) 412, recognized the authority of the District Court of Tennessee in *Tennessee Valley Authority v. Tennessee Electric Power Company, supra*, and refused to interfere with the jurisdiction of the Tennessee Court in the case last referred to.

As a further indication that the Congress did not intend by *Section 8a* to restrict jurisdiction to the northern judicial district of Alabama, *Section 19* gives the Authority access

to the records of the patent office and the right to make use of any patent and provides that

“* * * any owner of a patent whose patent rights may have been thus in any way * * * infringed * * * shall have * * * a cause of action against the corporation to be instituted and prosecuted on the equity side of *the appropriate district court of the United States.*” (Italics supplied)

Assuredly, if the Congress had intended to limit the jurisdiction to the northern judicial district of Alabama, it could very easily have stated in *Section 19* that the patentee shall have a cause of action to be prosecuted in the courts or in the district referred to in *Section 8a*. Instead of so doing, the Congress provided for the cause of action to be instituted in “*the appropriate district court of the United States.*”

Certainly had Congress intended to limit jurisdiction of suits against the Authority to the northern judicial district of Alabama, it would have said so specifically as no other federal corporation has ever been held to be subject to suit in but one jurisdiction. It must be remembered that under the *Tennessee Valley Authority Act*, the Authority is engaged in flood control work in at least six different states; assuredly, Congress never intended that persons damaged by acts of the Authority in any of these six states would have to journey to the northern judicial district of Alabama in order to vindicate their rights.

Section 8a not being limited only to actions *against* the Authority, the contention of the appellee poses the interesting question as to the manner in which the Authority would have enforced its rights had the appellant been guilty of a breach of the contract. The appellant, being a New York corporation, it could not be sued in Alabama unless it were engaged in business there at the time of the institution of such suit, and if *Section 8a* means what the appellee claims it means, then the Authority could not sue in the courts of New York. Certainly, such an absurd result was not the intent of the Congress.

The distinction between venue and jurisdiction was pointed out in *General Investment Company v. Lake Shore and Michigan Southern Railway Company*, 260 U. S. 261, and in *Lee v. Chesapeake and Ohio Railway Company*, 260 U. S. 653; in both cases the court had to consider whether *Section 51* of the *Judicial Code* (*U. S. C. A., Title 28, Sec. 112*) providing for the district in which civil suits might be brought, constituted a limitation on the jurisdiction of the district courts conferred by *Section 24* of the *Judicial Code* (*U. S. C. A. Title 28, Sec. 21*). The Court held that *Section 51* did not limit or abridge the jurisdiction of the district courts at all and conferred upon the defendant merely a personal privilege with respect to venue which he might waive at his option if the action were brought in the wrong district.

The purpose of *Section 8a* is apparent. The Authority, is a federal corporation and accordingly a citizen of the entire United States, subject to suit in the local courts of any state in which it might be doing business. *Title 28, Section 71, U. S. C. A.* authorizes the removal of a suit to the federal court in the district in which the suit was instituted provided it is an action of which the district court is given original jurisdiction. The original jurisdiction of the district courts is conferred by *Title 28, Section 41, U. S. C. A.* and is limited in the main, to suits arising under the laws of the United States or between citizens of different States. Since the adoption of the *Act of February 13, 1925, (U. S. C. A., Title 28, Sec. 42)*, the mere fact that the Authority is a federal corporation would not entitle it to remove such suit to the federal court unless the United States Government were the owner of more than one-half of its capital stock, which it is not, as the act does not provide for the issuance by the appellee of any capital stock. Being a federal corporation and thus a citizen of the entire United States, it could not remove the action to the federal court on the ground of diversity of citizenship, except for the inclusion in the act of *Section 8a*, making the Authority "an inhabitant and resident of the northern judicial district of Alabama within the

meaning of the laws of the United States, relating to the venue of civil suits," thus creating a diversity of citizenship entitling the Authority to remove the action to the federal district court. That and that alone is the sole purpose of *Section 8a* and accordingly it constituted no limitation on the jurisdiction of the court below.

CONCLUSION.

The judgment and order appealed from should be reversed and the motion denied.

Respectfully submitted,

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APPENDIX

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IN THE
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DISTRICT OF COLUMBIA.

No. 9150.

FEHLHABER PILE COMPANY, INC., *Appellant*,

v.

TENNESSEE VALLEY AUTHORITY, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia.

JOINT APPENDIX.

1

Filed March 29, 1945.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Columbia.

Civil Action No. 28317.

FEHLHABER PILE Co., INC., *Plaintiff*, New York, N. Y.

v.

TENNESSEE VALLEY AUTHORITY, *Defendant*, Woodward
Building, 1426 H St., N.W.

Complaint on Construction Contract.

The plaintiff, complaining of the defendant, respectfully
shows to this Court and alleges:

1. That at all times hereinafter mentioned the plaintiff was and still is a corporation, organized, created and existing under and by virtue of the laws of the State of New York.

2. That at all times hereinafter mentioned the defendant was and still is a Body Corporate, organized, created and existing under and by virtue of the laws of the United States.

3. That heretofore and on or about the 11th day of June, 1943, the plaintiff, therein designated as "Contractor," entered into a Contract in writing with the defendant, therein designated as the "Authority," wherein and whereby the plaintiff promised and agreed, as stated in the said Contract, "in accordance with the attached Conditions of Bid, Contract, Wage Scale, Specifications No. 3226, and the drawings mentioned therein," to "raise and extend the existing Louisville and Nashville Railroad Bridge over the Tennessee River * * *," for which the defendant promised to pay unto the plaintiff, and the plaintiff promised to accept, as stated in the said Contract, "the respective unit prices and lump sum stated opposite the several items in the Bid Schedule" forming a part of the said Contract, which
2 lump sums aggregated in all the total sum of \$318,416.50.

4. That the Contract hereinabove referred to, provided that the work of the plaintiff thereunder, was to commence upon the closing by the defendant of the then existing bridge in connection with which the said work was to be performed, which closing by the defendant, as stated in the said Contract, would occur about the 1st day of July, 1943, and the said Contract further provided that the work of the plaintiff thereunder, should commence immediately upon the said existing bridge being so closed by the defendant, and be fully completed by the plaintiff, within one hundred and eighty calendar days thereafter.

5. That on or about the 15th day of June, 1943 the defendant notified the plaintiff in writing, that the existing bridge would be closed by it and so made available to the

plaintiff for the commencement of its work under the Contract, between July 15th and August 1st, 1943, and the defendant in the said notice directed the plaintiff to immediately make preparations, so as to be ready to actually proceed with the commencement of its work no later than August 1st, 1943, with which direction the plaintiff complied.

6. That as a matter of fact, despite the said provisions of the Contract and the notice aforementioned, the existing bridge was not closed by the defendant and the site was not made available to the plaintiff for the commencement of the work called for under the Contract, until September 20, 1943, upon which date the plaintiff in fact commenced the performance of the work called for under the said Contract; that pursuant to the said Contract, March 18, 1944 accordingly became the date for the completion of the work called for thereunder, subject however to extensions or postponements of the date for completion, by reason of delays due to unforeseeable causes beyond the control of the plaintiff, as in the said Contract provided.

3 7. That after the said commencement of the work by the plaintiff and while the said work of the plaintiff was in progress, a Supplemental Contract in writing was entered into between the plaintiff and the defendant on the 18th day of October, 1943, wherein and whereby the plaintiff promised and agreed to furnish such other and additional work as might be requisite so as to, as stated in the Supplemental Contract, "complete the raising of the superstructure" of the bridge "to the new level" and to "complete all other work covered by the Contract to the extent that the raised bridge is ready for the laying of rail in permanent position thereon, on or before January 7, 1944" and so as to complete "any additional work to be done" under the Contract, "as soon thereafter as possible," for which the defendant promised and agreed in the said Supplemental Contract, to pay to the plaintiff, an additional compensation, the sum of \$63,600, over and above the amount provided to be paid under the original Contract hereinbefore mentioned.

8. That among the items of work to be done by the plaintiff, and called for under the Contract and Supplemental Contract aforementioned, as set forth in the plans and specifications referred to in the Contract (which plans and specifications had previously been drawn and designed by the defendant), Cast-in-place concrete piles were to be driven by the plaintiff into the subsurface and to rock, such piles being indicated in the said plans and specifications, to be driven at the proposed locations of concrete abutment "1" and concrete pier "A," to be thereafter erected by the plaintiff upon the said piles at the easterly approach to the bridge, and at the proposed location of concrete abutment "2," to be thereafter erected by the plaintiff upon the said piles at the westerly approach to the bridge; that the said piles so provided to be driven by the plaintiff, were in accordance with the said plans and specifications of the defendant, to have an outer shell of 7-gauge metal, of the Union Metal Manufacturing Company's Type YN18.

9. That pursuant to the said plans and specifications, one hundred and eighty of such piles were so to be driven, at one hundred and eighty indicated locations, such piles having an aggregate length, as set forth in the said plans and specifications, of 11,400 lineal feet; that on the basis of such an aggregate footage allocated among one hundred and eighty separate piles, the plaintiff had promised to accept and the defendant had promised to pay for this item of work, called for under the Contract, a unit price of \$6 per lineal foot, or \$68,400 in all, the latter amount forming a part of the aggregate consideration of \$318,416.50, promised and agreed to be paid by the defendant and promised and agreed to be accepted by the plaintiff under the Contract between them, aforementioned.

10. That the Contract above referred to, among its other terms and requirements, provided that the defendant itself was to be "responsible for the correctness of its design," and it further provided that the defendant itself, would

- (1) provide and place the earth fill for the embankment to be erected at the easterly approach to the bridge and for the embankment to be erected at the westerly approach to the bridge, and that it would place the rip rap upon such fill, the performance of all of which work by the defendant was, as expressly provided in the Contract, to be started by it immediately after the commencement of the work by the plaintiff, and was thereafter to be properly coordinated by it with the work of the plaintiff.
- (2) secure the construction of the railroad tracks over the easterly and westerly approach embankments to the new abutments, which were to be erected by the plaintiff, one at the easterly end of the bridge and one at the westerly end of the bridge, the construction of which
- 5 railroad tracks was to be accomplished, as provided for in the Contract, as soon as the approach embankments to be erected by the defendant, and hereinabove mentioned, were sufficiently completed by it, and
- (3) excavate that portion of the old existing embankment, which was located immediately above the indicated top elevation of the proposed new embankment, which it was to erect at the easterly approach to the bridge, which portion of the old existing embankment, so to be excavated by it, was situate immediately adjacent to the area where the piles for pier "A" were to be driven by the plaintiff.

11. That the Contract aforementioned, among its other terms and requirements, likewise provided

- (1) that the driving of the piles and shells by the plaintiff was not to be started until the excavation work, referred to in paragraph "10" hereof, had been completed by the defendant to the required elevation, and further
- (2) that the driving of the said piles and shells was not to be started by the plaintiff, until the embankment, referred to in paragraph "10" hereof, through which the piles were to extend, had been constructed by the defendant;

that as a matter of fact, the driving of the said piles and shells by the plaintiff, was not possible of performance, until such completion by the defendant of the said excavation and of the required embankment, which were situate at locations where the said piles and shells were to be driven.

12. That the plaintiff continued in the performance of its work under the Contract and Supplemental Contract aforementioned, up to the 2nd day of May, 1944, by which date all of the said work, as well as all of the extra and additional work hereinafter mentioned, were fully performed and completed, and the plaintiff, prior to the said date, duly and fully performed all of the terms, covenants and conditions of the Contract on its part to be performed, except insofar as prevented and rendered impossible of performance by the defendant, as is hereinafter set forth, and except insofar as modifications, changes and variances in the said work and performance thereof are concerned, which are hereinafter set forth.

13. That prior to the 18th day of November, 1943, and immediately upon the commencement of the driving of the piles by the plaintiff at the locations, in the manner and with the pile shells provided for in the Contract, it was ascertained by the plaintiff and by the defendant that the plan and specification requirement hereinabove referred to, that the said pile shells be driven to rock, was physically impossible of accomplishment, in view of the collapse under the said driving of the shells specified, long before they had penetrated to rock or to the elevations provided for in accordance with the plans and specifications, all because of the inadequacy and weakness of the shells designated.

14. That subsequent to the ascertainment of the inadequacy and weakness of the shell specified, as hereinabove mentioned, and after considerable delay on the part of the defendant and over the protest of the plaintiff, the defendant directed the plaintiff to discontinue all attempts to drive the said pile shells to rock and to drive them instead, to re-

sistance, or to elevations greatly above rock, so that instead of driving one hundred and eighty separate piles of a total length of 11,400 lineal feet, as called for in the Contract, there was required to be driven and in fact driven one hundred and eighty separate piles of an aggregate length of but 5867.8 lineal feet, so greatly increasing the cost or value per lineal foot of piling, over and above the unit of \$6 per lineal foot, provided for in the Contract, upon the basis of the driving of an aggregate length of 11,400 lineal feet of piling for the one hundred and eighty separate piles.

15. That both prior and subsequent to the change by the defendant of the type of piling installation, referred to in paragraph "14" hereof, and over the objection and protest of the plaintiff that the performance of such work would be futile, was not called for under the Contract, and was extra and additional work, the defendant required and directed the plaintiff to perform work in an endeavor to repair the piles which had collapsed in the driving because of the defendant's improper design aforementioned, which work so performed by the plaintiff, between early in December, 1943 and the 7th day of January, 1944, was ultimately acknowledged by the defendant as work not called for in the Contract and as extra and additional work for which the plaintiff was entitled to receive additional compensation; that by reason of the performance of the said work and the delay of the defendant in directing the performance thereof as extra and additional work, the raising of the superstructure or bridge to the new level, and the completion of all other work to the extent that the raised bridge could be ready for the laying of the rails in a permanent position thereon, on or before January 7, 1944, became impossible of accomplishment.

16. That the raising of the superstructure or bridge to the new level and the completion of all other work to the extent that the raised bridge would be ready for the laying of the rails in a permanent position thereon, on or before January 7, 1944, was further rendered impossible of accomplishment,

and in fact delayed until on or about the 24th day of February, 1944, by reason of

- (1) the time necessarily consumed in the securing from the mills of pile shells of the shorter length, required because of the direction of the defendant to drive the piles to "resistance," and not to rock, as provided for in the contract,
- (2) the time necessarily consumed by the plaintiff in its attempts to repair, at the direction of the defendant, the pile shells called for under the Contract, which had collapsed in the effort to drive the said shells to rock, as above set forth,
- 8 (3) the time lost by the plaintiff through the stoppage of the work of repairing the collapsed shells until the defendant directed the performance of the said work as an extra,
- (4) the time necessarily consumed by the defendant in its own attempts to repair the pile shells called for under the Contract, which had collapsed in the attempt to drive the said shells to rock, as above stated,
- (5) the time lost by the plaintiff, by reason of the delay of the defendant in its commencement of the doing of the excavation of the portion of the existing embankment at the easterly approach to the bridge, which excavation work was not commenced by it until after January 11, 1944 and was not completed by it until January 17, 1944, despite the fact that the said excavation work was required to be performed by it under the Contract prior to the commencement of the driving of the piles by the plaintiff at that location and despite the fact that such driving was not possible of accomplishment until the performance of such excavation work,
- (6) the delay and refusal of the defendant to do the embankment work at the approaches to the bridge, while the work of erecting abutments "1" and "2" was in progress, as was provided for in the Contract, which embankment work was not completed by the defendant until about February 20, 1944, despite the fact that under the Contract the approach spans to the bridge

could not be erected by the plaintiff until such embankment work was done by the defendant,

- (7) the delay on the part of the defendant in securing the construction of the railroad tracks to the abutment at the east end of the bridge and to the abutment at the west end of the bridge, as provided for by the Contract, which work at the easterly approach to the bridge was in fact not done by the defendant until on or about the 20th day of February, 1944, despite the fact that the placing of the said tracks was a physical prerequisite to the setting of the spans at the easterly end of the bridge, which setting had to precede the laying of the rails in a permanent position upon the raised bridge,
- 9 (8) the delays occasioned to the plaintiff through the performance by it of the extra and additional work hereinafter mentioned, as well as the performance by it of the other work, which is hereinafter stated to have been done by it under protest, and
- (9) the delays occasioned to the plaintiff through the improper taking away by the defendant and the performing by it of a portion of the work to be done by the plaintiff under the Contract, as is hereinafter set forth, and the delays occasioned to the plaintiff through the improper and unusual manner and method of the defendant in the performance of the said work.

17. That in violation and in breach of the provisions of the Contract and Supplemental Contract aforementioned, the defendant, without cause and over the protest of the plaintiff, arbitrarily and capriciously did, on the 8th day of January, 1944, take over the completion of the balance of the work then still to be performed by the plaintiff in connection with abutment "1" and pier "A," at the easterly approach to the bridge, though the plaintiff was able, ready and willing to perform and complete the said work and duly tendered such performance and completion to the defendant.

18. That in further violation and in breach of the provisions of the Contract and Supplemental Contract aforementioned, the defendant, without cause and over the pro-

test of the plaintiff, arbitrarily and capriciously did, on the 13th day of January, 1944, take over the completion of the balance of the work then still to be performed by the plaintiff in connection with abutment "2," at the westerly approach to the bridge, though the plaintiff was able, ready and willing to perform and complete the said work and duly tendered such performance and completion to the defendant.

10 19. That again in violation and in breach of the provisions of the Contract and Supplemental Contract aforementioned, the defendant, without cause and over the protest of the plaintiff, arbitrarily and capriciously did, on the 21st day of February, 1944, take over the erection of the approach spans at the easterly end of the bridge, though the plaintiff was able, ready and willing to erect the said spans and duly tendered the performance of such erection work to the defendant.

20. That the work so improperly taken over by the defendant and referred to in paragraphs "17" to "19" inclusive, could reasonably have been performed by the plaintiff at a maximum cost to it of \$15,044.15, the expenditure of which cost was not required of the plaintiff, because of the acts of the defendant referred to in the said paragraphs.

21. That on the 2nd day of May, 1944, subsequent to the completion of all of the work called for under the Contract and Supplemental Contract aforementioned, there became due and payable to the plaintiff for so much of the work done, as was called for under the Contract and Supplemental Contract, computed in accordance with the quantities in fact done and at the unit prices in the said instruments mentioned, the sum of \$351,094.06.

22. That by reason of the reduction in the quantity of the piling, from 11,400 lineal feet to 5867.8 lineal feet, as hereinabove set forth, rendering the unit compensation of \$6 per lineal foot, fixed in the Contract on the basis of the driving of 11,400 lineal feet inapplicable, as hereinabove set forth, the reasonable value of the work of driving the 5867.8 lineal

feet of piling amounted to \$53,005.14, or \$17,718.34 in excess of the compensation therefor at the unit rate of \$6 per lineal foot provided for in the Contract, so that there became due and payable to the plaintiff from the defendant, for the work called for under the Contract and Supplemental Contract, in addition to the sum of \$351,094.06 aforementioned, the further sum of \$17,718.34, or in all the total sum of \$368,812.40.

23. That between the 20th day of September, 1943 and the 2nd day of May, 1944, the plaintiff did, at the special instance and request of the defendant and upon its express promise to pay therefor, perform work, labor and services and provide materials and furnish equipment for use by the defendant, not called for in the Contract and Supplemental Contract, as itemized on "EXHIBIT A" attached hereto, of the aggregate reasonable value of \$5929.65.

24. That in violation and in breach of the Contract and Supplemental Contract, and over the protest of the plaintiff that under the Contract and Supplemental Contract it was not entitled thereto, and was not required of the plaintiff, the defendant (1) used the equipment of the plaintiff in the work which it did, of repairing the collapsed piles, (2) used the equipment and personnel of the plaintiff for the repair of the damage caused by the collapse of a trestle which had been erected by the defendant, which collapse was in nowise caused by the plaintiff, and (3) required of the plaintiff that it process the existing steel so that it could be used instead of furnishing and installing new steel called for under the Contract, for which use of equipment and for which processing of existing steel, the plaintiff was and is entitled to additional compensation to the extent of the reasonable value of such use and processing; in addition, the defendant required the plaintiff, contrary to the Contract and Supplemental Contract, to do the painting of the bridge span and the waterproofing of the piers of the said span, while the bridge was under traffic, instead of prior to the commencement of traffic, causing an increase in the cost of such

work to the plaintiff. For the use of equipment, the processing of existing steel and the doing of the painting and waterproofing under traffic, as above set forth, the plaintiff became and is entitled to additional compensation, to the extent of the reasonable value thereof, as set forth on "EXHIBIT B" attached hereto, aggregating in all, \$8,594.20, all of which the defendant arbitrarily and capriciously refused to pay.

25. That by reason of the delay of the defendant, in the closing of the existing bridge, and so not making the site available to the plaintiff for the commencement of its work by August 1, 1943, as directed by the defendant and above stated, and by reason of the interference by the defendant with the work of the plaintiff hereinabove set forth, so delaying performance by the plaintiff and requiring the doing of its work in other than the usual and customary manner, this plaintiff has been damaged in the sum of \$74,474.62, as set forth on "EXHIBIT C" attached hereto.

26. That by reason of the facts and items aforementioned, there became payable to the plaintiff from the defendant, the aggregate sum of \$457,810.87, less a credit of (1) \$15,044.15, representing the saving to the plaintiff because of its non-performance of the items of work improperly taken over by the defendant and hereinabove mentioned, and (2) \$3,055.10, the latter sum representing credits agreed upon between the plaintiff and the defendant for specific variances and omissions in the work called for under the Contract and Supplemental Contract, but requested by the defendant and agreed to by the plaintiff, so that there became due and payable unto the plaintiff from the defendant, the net sum of \$439,711.62.

27. That with the exception of the sum of \$285,768.55 received from the defendant, no part of the said sum of \$439,711.62 has been paid, although duly demanded, and there is now due and owing unto the plaintiff from the defendant the sum of \$153,943.07, with interest from the 2nd day of May, 1944.

13 WHEREFORE, the plaintiff prays for judgment as against the defendant for the sum of \$153,943.07, with interest from the 2nd day of May, 1944, together with the costs and disbursements of this action.

BERNARD J. GALLAGHER,
Attorney for Plaintiff,
 Union Trust Building,
 Washington, D. C.
 740 15th St. N.W.

Plaintiff demands a jury trial in this case.

BERNARD J. GALLAGHER.

14 **Exhibit A.**

1. Raising and maintaining lift span.....	\$929.23
2. Shifting of location of lift blocks.....	114.84
3. Repairs to collapsed piles.....	4167.15
4. Use of plaintiff's equipment to maintain trash boom	659.08
5. Change in painting materials.....	59.35
Total	\$5929.65

Exhibit B.

1. Use by the defendant of plaintiff's equipment to repair collapsed piles.....	\$1461.27
2. Use by the defendant of plaintiff's equipment and personnel in connection with collapse of trestle	1250.35
3. Processing of existing steel, instead of furnishing and installing new steel.....	414.74
4. Painting of span and waterproofing of piers under traffic	5467.84
Total	\$8594.20

Exhibit C.

1. Damage due to delay in commencement of work between August 1, 1943 and September 20, 1943.....	\$8457.07
2. Damages due to defendant's delays subsequent to September 20, 1943, interference with the plaintiff's work by the defendant and the requirement for the doing of the work by the plaintiff in other than the usual and customary manner	66017.55
Total	<u>\$74474.62</u>

* * * * *

15

Filed Apr 17 1945

Motion to Quash Service of Summons and Dismiss the Bill of Complaint for Lack of Jurisdiction and Improper Venue.

The defendant, Tennessee Valley Authority, appearing specially for the sole purpose of filing this motion and without submitting generally to the jurisdiction of the Court, moves the Court as follows:

1. To dismiss the action or in lieu thereof to quash the return of service of summons herein on the grounds that: (a) the defendant is not an inhabitant or resident of the District of Columbia and is not doing business in said District, as more clearly appears in the attached affidavit of Marguerite Owen, but is a federal corporation incorporated under and existing under and by virtue of the laws of the United States (48 Stat. 58 (1933), 16 U. S. C. sec. 831 et seq. (1940)), as amended, maintaining its principal office and domiciled in and a resident of Muscle Shoals, Alabama, pursuant to the provisions of section 8(a) of its 'basic act (16 U. S. C. sec. 831g); (b) the claim asserted in the complaint in this action arose in the State of Tennessee and has no connection with any business done by the defendant

in the District of Columbia and that the contract on which this action is brought was not entered into and was not to be and was not performed in whole or in part, within this district, as particularly appears in the attached affidavit of William J. Hagan, Jr.; and (c) the defendant is not subject to service of process within the District of Columbia.

16 2. To dismiss this action for the reason that it is in the wrong district because the plaintiff is a resident of the State of New York and a non-resident of the District of Columbia and of this district, and the defendant is an inhabitant and resident of the Northern District of Alabama and under the provisions of Section 8(a) of the Tennessee Valley Authority Act this action can be maintained against this defendant only in the Northern District of Alabama.

THOMAS J. GRIFFIN

Solicitor, Tennessee Valley Authority
Knoxville, Tennessee
(New Sprinkle Bldg.)

CHARLES J. MCCARTHY

Assistant General Counsel
(New Sprinkle Bldg.,
Knoxville, Tenn.)

WILLIAM J. COYNE

EDWARD M. CURRAN, U. S. Attny.
Attorneys for Defendant
Tennessee Valley Authority

* * * * *

17

Filed Apr 17 1945

Affidavit of Marguerite Owen.

DISTRICT OF COLUMBIA

City of Washington, ss:

Marguerite Owen, being first duly sworn, deposes and says:

I am the Washington Representative of the Tennessee Valley Authority and in charge of its Washington office. The functions of the Washington office are as follows:

1. To obtain information concerning all matters in the Capital which may affect the Authority, its policies, programs, and procedures and to convey such information to the General Manager and members of the Board of Directors.

2. To provide information relating to the Authority and to interpret and explain its programs and policies to interested representatives of the Government, such as members of Congress, of Congressional Committees, of the Executive Office of the President, and officials and employees of other federal agencies, and as requested to the public.

3. To arrange, as required, meetings between TVA officials and employees and officers and employees of other departments and agencies of the Government and to represent the Materials Division in the purchase of office supplies, materials, and technical services from other Government agencies. This office also makes a few other small purchases not exceeding a total of \$500 a year.

18 4. To provide space, information, and office service for the Board, General Manager, and TVA officials generally when in the Capital.

The staff of the Washington office consists of four full-time employees (three clerk-stenographers and myself), one clerk employed half time, and three messengers employed intermittently on an hourly basis.

To the best of my knowledge and belief, the Tennessee Valley Authority conducts no programs or operations re-

lating to flood control, navigation, land conservation, re-forestation, generation or transmission of power, or regional development in the District of Columbia.

MARGUERITE OWEN.

Subscribed and sworn to before me this 12th day of April 1945.

WM A. WILSON
Notary Public

My commission expires: January 31st, 1949.

* * * * *

19 Filed Apr 17 1945

Affidavit of William J. Hagan, Jr.

STATE OF TENNESSEE

County of Knox, ss:

William J. Hagan, Jr., being first duly sworn, deposes and says:

I am the Director of Purchases of the Tennessee Valley Authority.

Contract TV-77338 between the Fehlhaber Pile Company, Inc., and the Tennessee Valley Authority, the contract involved in the above action, was entered into between the parties at Knoxville, Tennessee. This contract called for the Fehlhaber Pile Company "to raise and extend the existing Louisville and Nashville Railroad Bridge over the Tennessee River" at a point in the State of Tennessee. It was not to be and was not performed, in whole or in part, within the District of Columbia.

WILLIAM J. HAGAN, JR.

Subscribed and sworn to before me this 14 day of April 1945.

ALICE M. SHEA,
Notary Public.

My commission expires July 11, 1948.

* * * * *

20

Filed Apr 30 1945

Affidavit.

DISTRICT OF COLUMBIA, ss:

I, Doris Nuttman, being duly sworn, depose and say that I reside at 1731 New Hampshire Avenue, Northwest, Washington, D. C. and that I am secretary in the office of Bernard J. Gallagher, Union Trust Building, Washington, D. C.; that I have visited the offices of Tennessee Valley Authority in Washington, D. C. The offices are located in the Woodward Building, and comprise a suite of about six rooms, with the name Tennessee Valley Authority on the door; that the name of Tennessee Valley Authority is shown on the building directory in the lobby of the Woodward Building; that Tennessee Valley Authority is regularly and continuously listed in the Washington telephone directory, both in its own right and also in the portion of the directory in which there are listed the United States Government offices and agencies; that the personnel of the offices maintained by Tennessee Valley Authority in Washington seems to consist of a receptionist and other personnel; that in payment of its obligations under the contract in suit, the Tennessee Valley Authority drew its checks or warrants upon the Treasurer of the United States in Washington. This last statement is made upon information and belief, and I believe it to be true.

DORIS NUTTMAN

Sworn and subscribed to before me this 30th day of April, 1945.

J. W. BRYNE,
Notary Public, District of Columbia.

My commission expires March 15, 1950

* * * * *

Filed Oct 11 1945

**Order Quashing Return of Service of Summons and
Dismissing the Complaint.**

This case came on to be heard at this term upon the motion of the defendant (1) to dismiss the action or, in lieu thereof, to quash the return of service of summons on the grounds that defendant is not an inhabitant or resident of the District of Columbia and is not doing business within the District and that the contract under which the action was brought was not entered into and was not to be, and was not, performed within the District; and (2) to dismiss the action for the reason that it is in the wrong district because the plaintiff is a non-resident of the District of Columbia and the defendant is an inhabitant and resident of the Northern District of Alabama, which motion was supported by affidavits of William J. Hagan, Jr., and Marguerite Owen and opposed by the affidavit of Doris Nuttman and was argued by counsel; and it appearing to the Court that the return of service of summons should be quashed and the case dismissed; it is therefore

ORDERED, ADJUDGED and DECREED, That the return of the service of summons on the defendant herein be quashed and that the action be dismissed.

22 It is FURTHER ORDERED, ADJUDGED, and DECREED, That the plaintiff shall pay the costs of this cause, for which execution may issue.

MATTHEW F. MCGUIRE,

Justice.

No objection as to form:

Attorney for Plaintiff,
Presented by:

DANIEL B. MAHER,
Assistant United States Attorney.

No. 9150

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

October Term, 1945

FEHLHABER PILE COMPANY

APPELLANT

v.

TENNESSEE VALLEY AUTHORITY

APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
for the District of Columbia*

JAN 29 1946

Joseph C. Swidler

CLERK

JOSEPH C. SWIDLER

General Counsel
Tennessee Valley Authority
Knoxville, Tennessee

CHARLES J. McCARTHY

Assistant General Counsel

EDWARD M. CURRAN

United States Attorney
Attorneys for Appellee

SIDNEY S. SACHS

Assistant United States Attorney

WILLIAM J. COYNE

Of Counsel

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United States Court of Appeals

DISTRICT OF COLUMBIA

October Term, 1945

FEHLHABER PILE COMPANY,

Appellant

v.

TENNESSEE VALLEY AUTHORITY,

Appellee

No. 9150

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant is a New York corporation (appellant's app. 2). The appellee, a corporate agency of the United States, has its principal office in and is a resident and inhabitant of the northern judicial district of Alabama (Tennessee Valley Authority Act of 1933, sec. 8(a); appellee's app. 29). The contract in suit was entered into at Knoxville, Tennessee, and was not to be performed in whole or in part within the District of Columbia (appellant's app. 17).

The appellee moved to dismiss the case or in lieu thereof to quash the return of service of summons on the ground that it is not a resident of the District of Columbia and is not doing business in the District and the claim did not arise out of any business transacted within the District. The motion to dismiss was also based on the ground of improper venue, but appellee is not insisting on the latter point.

The court below sustained appellee's motion and dismissed the action. It made no findings of fact, but none of the facts are in dispute. The activities carried on by appellee in the District of Columbia are fully described in the affidavits of Marguerite Owen (appellant's app. 16-17) and Doris Nuttman (appellant's app. 18). The statutory program of appellee is fully described in the Tennessee Valley Authority Act (appellee's app. 17-57).

The appellee is a regional agency created by Congress for the purpose of carrying on a program for the development of the natural resources of the Tennessee Valley and adjoining and related areas. Its activities may be briefly summarized as follows:

1. The development of the Tennessee River and its tributaries by a series of dams so as to provide a nine-foot navigable channel from the mouth of the Ohio River to Knoxville, Tennessee, and to control the destructive flood waters of the Tennessee and the lower Ohio and Mississippi Rivers.

2. The generation of electricity at the dams so created and the distribution of this electricity throughout the area within transmission distance of the dams in accordance with policies prescribed by Congress.

3. Land conservation and erosion control, principally through research and experimentation in the development of new forms of fertilizer, and the manufacture and distribution of fertilizer in accordance with policies prescribed by Congress.

4. A general program of regional research and development (appellee's app. 17-57).

No part of any of the foregoing programs is carried on within the District of Columbia. Appellee neither builds dams nor sells power nor distributes fertilizer within the District, nor are its regional development activities related in any way to the District of Columbia (appellant's app. 16-17; appellee's app. 17-57). It does, however, maintain within the District an office with four full-time and four part-time employees. This office is maintained for the purpose of carrying on such incidental functions as obtaining information of interest to appellee, furnishing information concerning appellee to Congress, the Executive Office of the President, and other governmental agencies, and providing office space and secretarial services for officials of appellee who may have occasion to be in Washington. The office also makes purchases of office supplies, materials, and technical services from other governmental agencies and a few other small purchases which do not exceed \$500 a year (appellant's app. 16-17).

STATUTES INVOLVED

The Tennessee Valley Authority Act and the pertinent provisions of the District of Columbia Code (1940) appear in the appendix, *infra* pages 17 to 58.

SUMMARY OF ARGUMENT

I

The appellee is not a domestic corporation and is therefore not subject to suit within the District of Columbia unless it is doing business therein. As a federal corporation, it is not a citizen of any state or of the District of Columbia. Its principal office is located in the northern district of Alabama, and by reason of the express provisions of the Tennessee Valley Authority Act, it is an inhabitant and resident only of the northern district of Alabama.

II

The Tennessee Valley Authority is not doing business in the District of Columbia. Its business consists of the construction and operation of dams and reservoirs for navigation, flood control, and power purposes, the generation and sale of electricity, soil conservation, including fertilizer research, manufacture, and distribution, and regional development. None of these activities and none of the management functions of the corporation are carried on within the District of Columbia. The office within the District performs only such incidental functions as obtaining and supplying information, furnishing office space and secretarial services to the appellee's staff when in Washington, and making a few small purchases. A corporation is not doing business in a jurisdiction so as to be suable therein unless either (1) some part of a major program or (2) central functions of management are carried on within the jurisdiction. Incidental activities coming within neither of these categories do not constitute "doing business."

ARGUMENT

I

The Appellee Is Not a Domestic Corporation of the District of Columbia.

We are not entirely clear as to the significance attached by appellant to Point I of its brief. While apparently contending that appellee is a domestic corporation of the District of Columbia, it concedes that it cannot be sued here unless it is doing business within the District. Appellee concedes that if it were doing business within the District of Columbia, this action could be maintained.

Appellee is a corporation created by act of Congress, and by virtue of the provisions of section 8(a) of the act, its principal office is located at Muscle Shoals, Alabama, and it is an inhabitant and resident of the northern judicial district of that state (appellee's app. 29). It is not incorporated under the laws of the District of Columbia and is not a domestic corporation of the District of Columbia (*Bankers Trust Co. v. Texas & Pac. Ry. Co.*, 241 U.S. 295 (1916); *Bacon v. Federal Reserve Bank*, 289 Fed. 513 (E.D. Wash., 1923); *Wolff & Co. v. Choctaw, O. & G.R.Co.*, 133 Fed. 601 (C.C.E.D.Ark., 1904); *Fisher & Van Gilder v. First Trust Joint-Stock L. Bank*, 210 Iowa 531, 231 N.W. 671 (1930); *Cf. Seaboard Co. v. Chicago, Etc., Ry. Co.*, 270 U.S. 363 (1926); *Nierbo Co. v. Bethlehem Corp.*, 308 U.S. 165 (1939)).

II

**The Tennessee Valley Authority Is Not Doing Business
Within the District of Columbia.**

The Tennessee Valley Authority is a corporation organized by Congress for the purpose of carrying out a program for the development of the natural resources of the Tennessee Valley and adjacent and related areas. Congress has specified in the act the means by which the program of regional development is to be carried out. Thus, it authorized construction on the Tennessee River and its tributaries of the dams and reservoirs necessary to provide adequate navigation on the Tennessee River and flood control for the Tennessee and lower Ohio and Mississippi Rivers; the generation of electricity at the dams and its distribution throughout the area within transmission distance; research and experimentation in the development of new forms of fertilizer in connection with the properties owned by the Government in the vicinity of Muscle Shoals, Alabama; the manufacture and distribution of fertilizer as part of a general program of soil conservation and soil erosion control; and studies, experiments, and demonstrations designed to foster the physical, economic, and social development of the Tennessee Valley and adjoining and related areas (appellee's app. 17-57).

The foregoing activities constitute the program, the *business* of the Tennessee Valley Authority. In addition, appellee performs certain activities which pertain not to its business or programs but to its *accountability* to Congress and the President. Included among these activities are the filing of an annual report with the Congress and the submission to an annual audit by the Comptroller

General (Tennessee Valley Authority Act, sec. 9; appellee's app. 29-31), which are relied on in appellant's brief (p. 6). Other activities in the same category are the furnishing of information to Congress and the Bureau of the Budget in support of requests for appropriations and the furnishing of information when requested by individual members of Congress or by the Executive Office of the President. All of these activities, however, are incidental functions having no direct relationship to the carrying out of its statutory programs. No part of its statutory program is carried on by appellee within the District of Columbia (appellant's app. 16-17). None of appellee's construction or manufacturing operations are carried on in the District of Columbia, nor has appellee ever sold a kilowatt of power or distributed a pound of fertilizer or embarked on any program of solicitation designed to promote the distribution of electric power or fertilizer in the District of Columbia.

It is true that appellee maintains an office within the District with a staff of four full-time and four part-time employees, seven of whom are clerk-stenographers or messengers; but the activities carried on by such employees are purely incidental functions, constituting no integral part of appellee's statutory programs. The functions of the Washington office are primarily the obtaining of information for appellee, the furnishing of information about appellee to Congress and others having a legitimate interest, and the furnishing of office space and secretarial services to employees of appellee who may have occasion to be in Washington. No one in the Washington office is authorized to exercise any of the functions of management.

The authority to request advice and assistance of employees of other federal agencies (Tennessee Valley

Authority Act, sec. 5(i); appellee's app. 26), relied on by appellant (appellant's br., p. 6), is likewise simply an incidental function. At most, only the request for assistance would take place within the District of Columbia. The actual assistance would presumably be rendered in the Tennessee Valley, where appellee is conducting its operations.

It is not every activity of a corporation that constitutes "doing business" within a jurisdiction so as to subject the corporation to the jurisdiction of the courts. The activities carried on may be both continuous and substantial and still not constitute "doing business" (*Layne v. Tribune Co.*, 63 App.D.C. 213, 71 F. (2d) 223 (1934); *Neely v. Philadelphia Inquirer Co.*, 61 App.D.C. 334, 62 F. (2d) 873 (1932); *Cancelmo v. Seaboard Air Line Ry.*, 56 App. D.C. 225, 12 F. (2d) 166 (1926); *Hutchinson v. Chase & Gilbert*, 45 F. (2d) 139 (C.C.A. 2d, 1930); *Rosenberg Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Johanson v. Alaska Treadwell Gold Mining Co.*, 225 Fed. 270 (W.D. Wash., 1915); *Macario v. Alaska Gastineau Mining Co.*, 96 Wash. 458, 165 Pac. 73 (1917)).

Whether the activities of a corporation constitute "doing business" depends primarily on the nature rather than the volume of the activities. In *International Shoe Co. v. State of Washington*, 14 U.S.L. Week 4032 (1945), the United States Supreme Court stated the rule as follows:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the

laws which it was the purpose of the due process clause to insure [p. 4034].

Thus, it is well settled that the maintenance of an office does not of itself constitute doing business (*Michigan Central v. Mix*, 278 U.S. 492 (1929); *Layne v. Tribune Co.*, *supra*; *Hutchinson v. Chase & Gilbert*, *supra*). Nor does the mere making of purchases, even though substantial in amount and continuing over a long period of time (*Rosenberg Co. v. Curtis Brown Co.*, *supra*; *Macario v. Alaska Gastineau Mining Co.*, *supra*), nor the mere gathering of information (*Layne v. Tribune Co.*, *supra*; *Neely v. Philadelphia Inquirer Co.*, *supra*).

While it is concededly difficult to lay down much in the way of general rules from the decided cases, we have been unable to find any case in any jurisdiction holding that a corporation is doing business under facts comparable to those in the case at bar. There are, on the contrary, a number of cases similar in their facts, in all of which the corporation was held not to be doing business (*Layne v. Tribune Co.*, *supra*; *Neely v. Philadelphia Inquirer Co.*, *supra*; *Cancelmo v. Seaboard Air Line Ry.*, *supra*; *Johanson v. Alaska Treadwell Gold Mining Co.*, *supra*; *Hutchinson v. Chase & Gilbert*, *supra*; *Macario v. Alaska Gastineau Mining Co.*, *supra*).

The cases in which corporations have been held to be doing business are without exception cases in which some part either of a major business program of the corporation or of the central function of management is being carried on within the jurisdiction. All of the cases cited by appellant fall within one or the other of these categories.

In *Haskell v. Aluminum Co. of America*, 14 F. (2d) 864 (D.Mass., 1926), the defendant was engaged in the manufacture and sale of aluminum and was carrying on a very

substantial business within the jurisdiction. It had an office known as the New England District Sales Office, with a district and local sales manager and eight salesmen engaged primarily in soliciting orders and investigating and reporting on complaints. In 1925 it sold about three million dollars' worth of goods through the office. The sale of its products is the major part of the business of any manufacturing corporation and is universally held to constitute doing business.¹ The local office of the Aluminum Company had no power to fill orders, the orders being sent to Pittsburgh. Defendant's theory apparently was that its business was interstate business. This fact is immaterial, however, because, as pointed out by the United States Supreme Court in *International Harvester v. Kentucky*, 234 U.S. 579 (1914):

... the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State, although the business transacted may be entirely interstate in character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the State [p. 589].

In *Frene v. Louisville Cement Co.*, 77 App.D.C. 129, 134 F. (2d) 511 (1943), the defendant was engaged in the business of manufacturing and selling a product known as "brixment." While much of the business was interstate in character, the corporation did a substantial business within the District of Columbia and had an agent who

¹ Mere solicitation has been held not to constitute "doing business" (*Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530 (1907)), but solicitation is an important part of a corporation's sales program, and very little more than mere solicitation is generally considered to be sufficient (*Hutchinson v. Chase & Gilbert*, 45 F. (2d) 139 (C.C.A. 2d, 1930)).

solicited orders within the District and also spent a good part of his time looking after jobs on which the material was used. The manufacture and sale of brixment and other cement products was the principal business of the company.

In *St. Louis S.W.Ry. v. Alexander*, 227 U.S. 218 (1913), the defendant railroad maintained an office, with a general freight and passenger agent and a traveling freight agent, where it handled the settlement of claims arising out of the transportation of goods over its line. Here, again, the settlement of claims was an integral and important part of the railroad's principal business of furnishing transportation.

In *Wendell v. Holland American Line*, 40 App.D.C. 1 (1913), the defendant maintained an office at which it sold tickets for passage on its lines. In the words of this Court

In the sale of tickets Hicks [its agent] was conducting the particular business for which defendant was incorporated [p. 6].

Washington-Virginia Ry. v. Real Estate Trust, 238 U.S. 185 (1915), and *Ferguson Contracting Co. v. Coal & Coke R. Co.*, 33 App.D.C. 159 (1909), were cases in which the management of the corporation was carried on within the jurisdiction. In the *Ferguson* case, which is heavily relied on in appellant's brief (pp. 8-9), the defendant was a West Virginia corporation which, for the major part of each year, maintained an office in the city of Washington from which the general management of its corporate affairs was conducted and which was used by its president, treasurer, and secretary. The contract on which the action was founded was also executed in the District of Columbia. This Court held that "the performance by the general

officers of their duties of management and supervision of the affairs of the corporation amounts to doing business" (33 App.D.C. at 170).

None of the managing officers of the Tennessee Valley Authority reside or have their offices in the District of Columbia; no part of the "management and supervision of the affairs of the corporation" is carried on in the District. On the contrary, the responsible officials of the Tennessee Valley Authority all have their offices in the Tennessee Valley, where its statutory program is being carried out.²

In the *Washington-Virginia Railway* case, a substantial part of the management and supervision of the affairs of the defendant corporation was carried on within the jurisdiction. The defendant maintained an office in the city of Philadelphia, where the president spent two days a week and where he transacted "such business of the company as came to his attention" (238 U.S. at 189). The corporation listed the office with the Philadelphia Stock Exchange as its general and transfer office. The bookkeeper had his desk there, made entries in the corporate books, and conducted general correspondence with reference to corporate affairs. The Court held that at the time of the service of process the corporation was "transacting an essential and material part of its business" within the eastern district of Pennsylvania (*id.* at 190).

This Court has frequently held that corporations were not doing business within the District of Columbia although their activities were just as extensive as those of the Tennessee Valley Authority and much more closely related to the major business of the corporation (*Layne v. Tribune*

² See Report of the Joint Committee on the Investigation of the Tennessee Valley Authority, 76th Cong., 1st sess. (1939) p. 21.

Co., 63 App.D.C. 213, 71 F. (2d) 223 (1934); *Cancelmo v. Seaboard Air Line Ry.*, 56 App.D.C. 225, 12 F. (2d) 166 (1926); *Neely v. Philadelphia Co.*, 61 App.D.C. 334, 62 F. (2d) 873 (1932); see *Whitaker v. Macfadden Publications*, 70 App.D.C. 165, 167, 105 F. (2d) 44, 45 (1939)).

In *Layne v. Tribune Co.*, *supra*, the corporation maintained an office in the District with a staff of six permanent employees. The manager of the office purchased supplies and had the right to employ extra help. The function of the Washington office was to obtain information, and the corporation maintained a leased wire to Chicago over which the information was transmitted. There the information was examined and either used in the defendant's newspaper or discarded, and some of it was supplied to other newspapers. These activities had a much closer relationship to defendant's business of publishing a newspaper than do any of the activities of the Tennessee Valley Authority's Washington office to the programs of this corporation.

In *Cancelmo v. Seaboard Air Line Ry.*, *supra*, the defendant railroad maintained two offices in the District, one for its general counsel and one for a traffic representative who solicited business over its line and sold scrip or interchangeable mileage books and a form of contract for passage between certain points on the Seaboard line so written as to favor patrons of the through route to the South, of which the defendant operated a portion. Again, these activities bore a much closer relation to the business of a railroad than do any of the activities of the Tennessee Valley Authority's Washington office to the programs of this corporation, but they were held by this Court to be insufficient to constitute doing business.

It should also be pointed out that practically all of the activities of the Tennessee Valley Authority in the District of Columbia involve relationships with the Federal Government and not with the government of the District of Columbia or the people who reside within the District. The filing of reports with Congress; the furnishing of information to Congress, the Executive Office of the President, and other governmental agencies; attendance at Appropriation and other Congressional Committee hearings; the submission of the annual budget to the Bureau of the Budget; and the obtaining of information from other governmental agencies all involve relationships with the Federal Government.

The purpose of appellee in maintaining an office in the District of Columbia is to facilitate the handling of its relationships with the Federal Government. There is no fundamental difference between its position and that of the many private corporations that maintain offices in the District for that very reason. The expanding functions of the Federal Government have made it a practical necessity for any large corporation to maintain a Washington office to facilitate the handling of its relationships with the Government in such varied fields as taxation, price control, labor relations, patents, and freight rates, to mention only a few. The effect of a decision that the Tennessee Valley Authority is doing business within the District of Columbia would be to bring all such corporations within the jurisdiction of its courts. The language of this Court in *Neely v. Philadelphia Inquirer Co.*, *supra*, is pertinent:

As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents

there. If the employment of a Washington correspondent, the announcement of his address, and the payment of his office rent, subjects a non-resident newspaper corporation to legal process in Washington for matter appearing in its paper at home, it would bring in nearly every important newspaper in the nation, and many foreign publishing corporations, which in our opinion the present statute does not do [62 F. (2d) at 875].

Appellee has no direct relationships with the government of the District of Columbia, and the only activities which involve direct contacts with the people of the District are the rental of its offices and the purchase of a small amount of supplies. The case at bar is far different from the situation involved in cases like *Frene v. Louisville Cement Co.*, *supra*, involving corporations which regularly supply their manufactured products to persons within the District of Columbia and presumably avail themselves of the courts of the District whenever necessary to enforce their rights. The contacts of such corporations with the citizens of the District of Columbia are such that occasional litigation becomes almost inevitable. Since the corporation avails itself of the protection afforded by the government of the District to *do business* with its citizens, it is only fair that it should respond to their claims in their local courts.

In the case at bar, the appellant is a New York corporation; the contract on which the action is founded was not executed in the District of Columbia and has no relationship to any activity carried on by appellee within the District; appellee's attorneys and the employees who would be required to testify in this action are located in the Tennessee Valley, hundreds of miles away; and appellee has no contacts with the District of Columbia except such as result

from the rental of an office and the purchase of a few supplies. In short, appellee has no such "contacts . . . with the state of the forum as to make it reasonable, in the context of our federal system of government, to require the corporation to defend [this] particular suit" (*International Shoe Co. v. State of Washington*, 14 U.S.L. Week 4032, 4033 (1945)).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

TENNESSEE VALLEY AUTHORITY ACT

[PUBLIC—No. 17—73^d CONGRESS, 1ST SESSION]

[H. R. 5081]

May 18, 1933, 48 Stat. 58

[As amended by Public—No. 412—74th Congress,
1st Session]

[H. R. 8632]

August 31, 1935, 49 Stat. 1075

[As amended by Public—No. 224—76th Congress,
1st Session]

[S. 1796]

July 26, 1939, 53 Stat. 1083

[As amended by Public Resolution—No. 88—76th Congress,
3^d Session]

[H. J. Res. 544]

June 26, 1940, 54 Stat. 611

[As amended by Public—No. 184—77th Congress,
1st Session]

[H. R. 2097]

July 18, 1941, 55 Stat. 599

[As amended by Public—No. 306—77th Congress,
1st Session]

[H. R. 4961]

November 21, 1941, 55 Stat. 775

AN ACT

To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and

near Muscle Shoals in the State of Alabama, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may be cited as the "Tennessee Valley Authority Act of 1933." [48 Stat. 58-59.]¹

SEC. 2. (a) The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.

(b) The terms of office of the members first taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall

¹ For the purpose of identifying the sections which appeared in the original act of 1933 and those which have been brought into the act by amendment, references have been placed at the end of the sections. For example, the reference at the end of section 1, 48 Stat. 58-59, indicates that this section will be found in volume 48 of the Statutes at Large on pages 58 to 59. All sections will be found in volumes 48, 49, 53, 54, and 55 of the Statutes at Large as indicated.

be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Vacancies in the board so long as there shall be two members in office shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Each of the members of the board shall be a citizen of the United States, and shall receive a salary at the rate of \$10,000 a year, to be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the board by this Act. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) The board shall direct the exercise of all the powers of the Corporation.

(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act. [48 Stat. 59.]

SEC. 3. The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents, as are necessary for the transaction of its business, fix their compensation, define their duties, require bonds of such of them as the board may designate, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

Insofar as applicable, the benefits of the Act entitled "An Act to provide compensation for employees of the

United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended, shall extend to persons given employment under the provisions of this Act. [48 Stat. 59-60].

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

- (a) Shall have succession in its corporate name.
- (b) May sue and be sued in its corporate name.
- (c) May adopt and use a corporate seal, which shall be judicially noticed.
- (d) May make contracts, as herein authorized.
- (e) May adopt, amend, and repeal bylaws.
- (f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safekeeping of the securities and moneys of the said Corporation as the board may require: *Provided*, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings [48 Stat. 60-61]: *Provided*, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. [49 Stat. 1075.]

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct powerhouses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system. [48 Stat. 61, as amended by 49 Stat. 1075.]

(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: *Provided*, That no transfer authorized herein in (b) shall be made without the approval of Congress: *And provided further*, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: *Provided, however*, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: *And provided further*, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds \$500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President. [49 Stat. 1076, as amended by 55 Stat. 599-600.]

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. [49 Stat. 1080.]

SEC. 5. The board is hereby authorized—

(a) To contract with commercial producers for the production of such fertilizers or fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. Such contracts may provide either for outright purchase of materials by the board or only for the payment of carrying charges on special materials manufactured at the board's request for its program.

(b) To arrange with farmers and farm organizations for large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce. [48 Stat. 61.]

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms,

with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise. [48 Stat. 61, as amended by 49 Stat. 1076.]

(d) The board in order to improve and cheapen the production of fertilizer is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the employment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

(e) Under the authority of this Act the board may make donations or sales of the product of the plant or plants operated by it to be fairly and equitably distributed through the agency of county demonstration agents, agricultural colleges, or otherwise as the board may direct, for experimentation, education, and introduction of the use of such products in cooperation with practical farmers so as to obtain information as to the value, effect, and best methods of their use.

(f) The board is authorized to make alterations, modifications, or improvements in existing plants and facilities, and to construct new plants.

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from this obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

(h) To establish, maintain, and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, and nitrogen and other fertilizer products for agricultural purposes in the most economical manner and at the highest standard of efficiency.

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the services of such officers, agents, and employees, and the President shall, if in his opinion, the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual that may be by the President directed to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board: *Provided*, That any invention or discovery made by virtue of and incidental to such service by an employee of the Government of the United States serving under this section, or by any employee of the Corporation, together with any patents which may be granted thereon, shall be the sole and exclusive property of the Corporation, which is hereby authorized to grant such licenses thereunder as shall be authorized by the board: *Provided further*, That the board may pay to such inventor such sum from the income from sale of licenses as it may deem proper.

(j) Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of War the Corporation shall allot and deliver without charge to the War Department so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

(m) No products of the Corporation shall be sold for use outside of the United States, its Territories and possessions, except to the United States Government for the use of its Army and Navy, or to its allies in case of war.

(n) The President is authorized, within twelve months after the passage of this Act, to lease to any responsible farm organization or to any corporation organized by it nitrate plant numbered 2 and Waco Quarry, together with the railroad connecting said quarry with nitrate plant numbered 2, for a term not exceeding fifty years at a rental of not less than \$1 per year, but such authority shall be subject to the express condition that the lessee shall use said property during the term of said lease exclusively for the manufacture of fertilizer and fertilizer ingredients to be used only in the manufacture of fertilizer by said lessee and sold for use as fertilizer. The said lessee shall covenant to keep said property in first-class condition, but the lessee shall be authorized to modernize said plant numbered 2 by the installation of such machinery as may be necessary, and is authorized to amortize the cost of said machinery and improvements over the term of said lease or any part thereof. Said lease shall also provide that the board shall sell to the lessee power for the operation of said plant at the same schedule of prices that it charges all other customers for power of the same class and quantity. Said lease shall also provide that, if the said lessee does not desire to buy power of the publicly owned plant, it shall have the right to purchase its power for the operation of said plant of the Alabama Power Company or any other publicly or privately owned corporation engaged in the generation and sale of electric power, and in such case the lease shall provide further that the said lessee shall have a free right of way to build a transmission line over Government property to said plant paying the actual expenses and damages, if any, incurred by the Corporation on account of such line. Said lease shall also provide that

the said lessee shall covenant that during the term of said lease the said lessee shall not enter into any illegal monopoly, combination, or trust with any privately owned corporation engaged in the manufacture, production, and sale of fertilizer with the object or effect of increasing the price of fertilizer to the farmer. [48 Stat. 61-63.]

SEC. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board. [48 Stat. 63.]

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Numbered 2, located at Muscle Shoals, its powerhouse, and all hydro-electric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

(b) The President of the United States is authorized to provide for the transfer to the Corporation of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated. [48 Stat. 63.]

SEC. 8. (a) The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.

(b) The Corporation shall at all times maintain complete and accurate books of accounts.

(c) Each member of the board, before entering upon the duties of his office, shall subscribe to an oath (or affirmation) to support the Constitution of the United States and to faithfully and impartially perform the duties imposed upon him by this Act. [48 Stat. 63.]

SEC. 9. (a) The board shall file with the President and with the Congress, in December of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries, and duties of those receiving compensation at the rate of more than \$1,500 a year. [48 Stat. 63.]

(b) All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental

equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed \$500; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among business men: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: *Provided*, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting

Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties entrusted to the Corporation by law. [48 Stat. 63-64, as amended by 49 Stat. 1080-1081.]

Nothing in this Act shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to section 236, Revised Statutes, as amended by section 305 of the Budget and Accounting Act, 1921 (42 Stat. 24), and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: *Provided*, That, subject only to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the accounts of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said Act.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in the Tennessee Valley Authority Act of 1933, as amended. [55 Stat. 775-776.]

SEC. 9a. The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority. [49 Stat. 1076.]

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided*, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages

that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further*, That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region [48 Stat. 64]: *Provided further*, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further*, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*, That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction. [49 Stat. 1076.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a

whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 Stat. 64-65.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board

is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further*, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further*, That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable

terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65-66.]

SEC. 12a. In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth in this Act; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines. [49 Stat. 1076-1077.]

SEC. 13. In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year

thereafter, 5 per centum. "Gross proceeds," as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payments shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: *Provided*, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said

property was privately owned and operated or said land was privately owned: *Provided further*, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than \$10,000 in any case: *Provided further*, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the

distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation. [48 Stat. 66, as amended by 54 Stat. 626-627.]

SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants at nitrate plant numbered 1 and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated. [48 Stat. 66.]

The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board, and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such properties as have been completed during the preceding fiscal year.

For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution

of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete account of the total cost of generating and transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform system of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is hereby empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Commission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 9 (a) of the "Tennessee Valley Act of 1933," the Board shall file with

each annual report a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power. [49 Stat. 1077.]

SEC. 15. In the construction of any future dam, steam plant, or other facility, to be used in whole or in part for the generation or transmission of electric power the board is hereby authorized and empowered to issue on the credit of the United States and to sell serial bonds not exceeding \$50,000,000 in amount, having a maturity not more than fifty years from the date of issue thereof, and bearing interest not exceeding $3\frac{1}{2}$ per centum per annum. Said bonds shall be issued and sold in amounts and prices approved by the Secretary of the Treasury, but all such bonds as may be so issued and sold shall have equal rank. None of said bonds shall be sold below par, and no fee, commission, or compensation whatever shall be paid to any person, firm, or corporation for handling, negotiating the sale, or selling the said bonds. All of such bonds so issued and sold shall have all the rights and privileges accorded by law to Panama Canal bonds, authorized by section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5), as now compiled in section 743 of title 31 of the United States Code. All funds derived from the sale of such bonds shall be paid over to the Corporation. [48 Stat. 66-67.]

SEC. 15a. With the approval of the Secretary of the Treasury, the Corporation is authorized to issue bonds not to exceed in the aggregate \$50,000,000 outstanding at any one time, which bonds may be sold by the Corporation to obtain funds to carry out the provisions of section 12a of this Act. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding $3\frac{1}{2}$ per centum per annum, shall be

subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of $3\frac{1}{2}$ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. No bonds shall be issued hereunder to provide

funds or bonds necessary for the performance of any proposed contract negotiated by the Corporation under the authority of section 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's **determination of the matter** shall be final. The authority of the Corporation to issue bonds hereunder shall expire at the end of five years from the date when this section as amended herein becomes law, except that such bonds may be issued at any time after the expiration of said period to provide bonds or funds necessary for the performance of any contract entered into by the Corporation, prior to the expiration of said period, under the authority of section 12a of this Act. [49 Stat. 1078.]

SEC. 15b. No bonds shall be issued by the Corporation after the date of enactment of this section under section 15 or section 15a.

SEC. 15c. With the approval of the Secretary of the Treasury the Corporation is authorized, after the date of enactment of this section, to issue bonds not to exceed in the aggregate \$61,500,000. Such bonds may be sold by the Corporation to obtain funds which may be used for the following purposes only:

(1) Not to exceed \$46,000,000 may be used for the purchase of electric utility properties of the Tennessee Electric Power Company and Southern Tennessee Power Company, as contemplated in the contract between the Corporation and the Commonwealth and Southern Corporation and others, dated as of May 12, 1939.

(2) Not to exceed \$6,500,000 may be used for the purchase and rehabilitation of electric utility properties of the Alabama Power Company and Mississippi Power Company in the following named counties in northern Alabama and northern Mississippi: The counties of Jackson, Madison, Limestone, Lauderdale, Colbert, Lawrence, Morgan,

Marshall, De Kalb, Cherokee, Cullman, Winston, Franklin, Marion, and Lamar in northern Alabama, and the counties of Calhoun, Chickasaw, Monroe, Clay, Lowndes, Oktibbeha, Choctaw, Webster, Noxubee, Winston, Neshoba, and Kemper in northern Mississippi.

(3) Not to exceed \$3,500,000 may be used for rebuilding, replacing, and repairing electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section.

(4) Not to exceed \$3,500,000 may be used for constructing electric transmission lines, substations, and other electrical facilities necessary to connect the electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section with the electric power system of the Corporation.

(5) Not to exceed \$2,000,000 may be used for making loans under section 12a to States, counties, municipalities, and nonprofit organizations to enable them to purchase any electric utility properties referred to in the contract between the Corporation and the Commonwealth and Southern Corporation and others, dated as of May 12, 1939, or any electric utility properties of the Alabama Power Company or Mississippi Power Company in any of the counties in northern Alabama or northern Mississippi named in paragraph (2).

The Corporation shall file with the President and with the Congress in December of each year a financial statement and complete report as to the expenditure of funds derived from the sale of bonds under this section covering the period not covered by any such previous statement or report. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding $3\frac{1}{2}$ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may

be prescribed by the Corporation with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of $3\frac{1}{2}$ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bond hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. None of the proceeds of the bonds shall be used for the performance of any proposed contract negotiated by the Corporation

under the authority of section 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds under this section shall expire January 1, 1941, except that if at the time such authority expires the amount of bonds issued by the Corporation under this section is less than \$61,500,000, the Corporation may, subject to the foregoing provisions of this section, issue, after the expiration of such period, bonds in an amount not in excess of the amount by which the bonds so issued prior to the expiration of such period is less than \$61,500,000, for refunding purposes, or, subject to the provisions of paragraph (5) of this section (limiting the purposes for which loans under section 12a of funds derived from bond proceeds may be made) to provide funds found necessary in the performance of any contract entered into by the Corporation prior to the expiration of such period, under the authority of section 12a. [53 Stat. 1083-1085.]

SEC. 16. The board, whenever the President deems it advisable, is hereby empowered and directed to complete Dam Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the additional power unit in the steam plant at nitrate plant numbered 2. [48 Stat. 67.]

SEC. 17. The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct, either directly or by contract to the lowest responsible bidder, after due advertisement, a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to

the latest and most approved designs, including power house and hydro-electric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam: *Provided, however,* That the President is hereby authorized by appropriate order to direct the employment by the Secretary of War, or by the Secretary of the Interior, of such engineer or engineers as he may designate, to perform such duties and obligations as he may deem proper, either in the drawing of plans and specifications for said dam, or to perform any other work in the building or construction of the same. The President may, by such order, place the control of the construction of said dam in the hands of such engineer or engineers taken from private life as he may desire: *And provided further,* That the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights. [48 Stat. 67.]

SEC. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of

the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam, transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River. [48 Stat. 67-68.]

SEC. 19. The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent Office of the United States for the purpose of studying, ascertaining, and copying all methods, formulae, and scientific information (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydro-electric power, and any owner of a patent whose patent rights may have been thus in any way copied, used, infringed, or employed by the exercise of this authority by the Corporation shall have as the exclusive remedy a cause of action against the Corporation to be instituted and prosecuted on the equity side of the appropriate district court of the United

States, for the recovery of reasonable compensation for such infringement. The Commissioner of Patents shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office: *Provided*, That the benefits of this section shall not apply to any art, machine, method of manufacture, or composition of matter, discovered or invented by such employee during the time of his employment or service with the Corporation or with the Government of the United States. [48 Stat. 68.]

SEC. 20. The Government of the United States hereby reserves the right, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in this Act for the purpose of manufacturing explosives or for other war purposes; but, if this right is exercised by the Government, it shall pay the reasonable and fair damages that may be suffered by any party whose contract for the purchase of electric power or fixed nitrogen or fertilizer ingredients is hereby violated, after the amount of the damages has been fixed by the United States Court of Claims in proceedings instituted and conducted for that purpose under rules prescribed by the court. [48 Stat. 68.]

SEC. 21. (a) All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

(b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than five years, or both.

(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than \$5,000 or imprisoned not more than five years, or both. [48 Stat. 68-69.]

SEC. 22.² To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act, and to provide for the general welfare of the citizens of said areas, the President is hereby authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end. [48 Stat. 69.]

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the general purposes stated in said section, and for the especial purpose of bringing about in said

² The powers conferred upon the President by this and the succeeding section were delegated to the Board of Directors of the Tennessee Valley Authority by Executive Order No. 6161, dated June 8, 1933.

Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin. [48 Stat. 69.]

SEC. 24. For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary, in the carrying out of any of the provisions of this Act, the President of the United States for a period of three years from the date of the enactment of this Act, is hereby authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after the enactment of this Act, the President is further authorized to sell or lease any parcel or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this Act. Any such contract made by the President of the United States shall be carried out by the board: *Provided*, That no such contract shall be made that will in any way abridge or take away the preference

right to purchase power given in this Act to States, counties, municipalities, or farm organizations: *Provided further*, That no lease shall be for a term to exceed fifty years: *Provided further*, That any sale shall be on condition that said land shall be used for industrial purposes only. [48 Stat. 69-70.]

SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed \$15 for their services, together with an additional amount of \$5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned,

and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the

payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward. [48 Stat. 70-71.]

SEC. 26. Commencing July 1, 1936, the proceeds for each fiscal year derived by the Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including the disposition of any real or personal property, shall be paid into the Treasury of the United States at the

end of each calendar year, save and except such part of such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients. A continuing fund of \$1,000,000 is also excepted from the requirements of this section and may be withheld by the Board to defray emergency expenses and to insure continuous operation: *Provided*, That nothing in this section shall be construed to prevent the use by the Board, after June 30, 1936, of proceeds accruing prior to July 1, 1936, for the payment of obligations lawfully incurred prior to such latter date. [48 Stat. 71, as amended by 49 Stat. 1079.]

SEC. 26a. The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

In the event the Board shall, within sixty days after their formal submission to the Board, fail to approve any plans or modifications, as the case may be, for construction, operation, or maintenance of any such structures on the Little Tennessee River, the above requirements shall be deemed satisfied, if upon application to the Secretary of War, with due notice to the Corporation, and hearing thereon, such plans or modifications are approved by the

said Secretary of War as reasonably adequate and effective for the unified development and regulation of the Tennessee River system.

Such construction, commencement of construction, operation, or maintenance of any structures or parts thereof in violation of the provisions of this section may be prevented, and the removal or discontinuation thereof required by the injunction or order of any district court exercising jurisdiction in any district in which such structures or parts thereof may be situated, and the Corporation is hereby authorized to bring appropriate proceedings to this end.

The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of this section. [49 Stat. 1079.]

SEC. 27. All appropriations necessary to carry out the provisions of this Act are hereby authorized. [48 Stat. 71.]

SEC. 28. That all Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act. [48 Stat. 71.]

SEC. 29. The right to alter, amend, or repeal this Act is hereby expressly declared and reserved, but no such amendment or repeal shall operate to impair the obligation of any contract made by said Corporation under any power conferred by this Act. [48 Stat. 72.]

SEC. 30. That the sections of this Act are hereby declared to be separable, and in the event of any one or more sections of this Act, or parts thereof, be held to be unconstitutional, such holding shall not affect the validity of

other sections or parts of this Act. [48 Stat. 72, as amended by 49 Stat. 1081.]

SEC. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: *Provided*, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4 (k) of this Act. [49 Stat. 1080.]

**PERTINENT PROVISIONS OF DISTRICT OF
COLUMBIA CODE (1940)**

§11-306 (18:44). General jurisdiction.

Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States. (R.S.D.C., § 763; Feb. 27, 1877, 19 Stat. 253, ch. 69, § 2.) [Title 11—Judiciary and Jurisdiction.]

* * *

§13-103 (24:373). Service on foreign corporations.

In actions against foreign corporations doing business in the District all process may be served on the agent of such corporation or person conducting its business, or, in case he is absent and can not be found, by leaving a copy at the principal place of business in the District or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the court.

When a foreign corporation shall transact business in the District without having any place of business or resident agent therein, service upon any officer or agent or employee of such corporation in the District shall be effectual as to suits growing out of contracts entered into or to be performed, in whole or in part, in the District of Columbia or growing out of any tort committed in the said District. (Mar. 3, 1901, 31 Stat. 1419, ch. 854, § 1537; June 30, 1902, 32 Stat. 544, ch. 1329; Feb. 1, 1907, 34 Stat. 874, ch. 445.) [Title 13—Process, Pleadings, and Parties.]

IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 9150

FEHLHABER PILE COMPANY, INC.,

against

TENNESSEE VALLEY AUTHORITY,

*United States Court of Appeals
for the District of Columbia*

FILED FEB 1 1962

Appellant,

Appellee.

REPLY BRIEF OF APPELLANT

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Appellee.

REPLY BRIEF OF APPELLANT

This brief is submitted in reply to the appellee's argument that it is not doing business within the District of Columbia (Appellee's Brief Point II, pp. 6-16).

The appellee concedes "that if it were doing business within the District of Columbia, this action could be maintained" (Appellee's Brief p. 5). It also concedes that it has a permanent Washington office in which it carries on substantial activities (Appellee's Brief pp. 6-7). It asserts, however, that its "business" is the construction of dams, the sale of electric power and the distribution of fertilizer incident to its statutory program for the development of the natural resources of the Tennessee Valley. This "business", it claims, is not conducted within the District of Columbia. The activities which it does carry on in its Washington office, it says, have no direct relationship to its "business" but are merely "incidental functions" (Appellee's Brief p. 7).

The appellee's argument is untenable. Its attempted distinction between activities that constitute its "business" and those which are "incidental functions" finds no support in the authorities. A foreign corporation is subject to suit in a particular forum when it is present within the territorial limits of the jurisdiction invoked. By judicial concept, presence within the jurisdiction is manifested when the foreign corporation is doing business there. (*Tanza v. Susquehanna Coal Co.*, 220 N. Y. 259, 267, 268, 115 N. E. 915.) What constitutes "doing business" depends primarily on the nature of the activities carried on by the corporation. (*International Shoe Co. v. State of Washington*, 14 U. S. L. Week 4032.) The determination of the question as to whether the activities of a corporation constitute "doing business", is not limited to a consideration of those activities which are carried on solely in furtherance of the particular business for which the corporation was created. (*Ferguson Contracting Co. v. Coal & C. R. Co.*, 33 App. D. C. 159.) In the *Ferguson* case, *supra*, this Court in considering this very subject, expressed itself in language which is particularly appropriate here, as follows (p. 169):

"A corporation is usually created and empowered to engage in some particular business or enterprise, but it necessarily exercises many powers, and transacts many matters of business, incidental to the main object. It has the power, therefore, not only to establish offices for the conduct of its chief business, but also for the transaction of any business incidental thereto."

In *Wendell v. Holland American Line*, 40 App. D. C. 1, this Court following the principles enunciated in the *Ferguson* case, stated:

"It is idle to say, as suggested in brief for defendant, that the sale of tickets is no part of the business for which defendant was incorporated. It is not essential that a company be conducting its chief business within the District to subject it to service."

The absence of any requirement that a foreign corporation must actually conduct its chief business within the jurisdiction where suit is brought against it, was recognized by the United States Supreme Court in *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218. There the defendant railroad maintained an office within the jurisdiction invoked, where it handled the settlement of claims arising out of the transportation of goods over its line. The chief business of the railroad company was transportation; the settlement of claims against it, though essential, was merely incidental to the conduct of its business. If, as the appellee contends, the settlement of claims was an integral and an important part of the railroad company's business of furnishing transportation (Appellee's Brief p. 11), assuredly the activities carried on by the appellee in its Washington office were likewise an integral and important part of its business.

It is significant that in determining whether a foreign corporation's activities in a particular jurisdiction have manifested its presence there, the adjudicated cases make no distinction between activities carried on in furtherance of its "chief business" and those which constitute merely "incidental functions". (*In re Hohorst*, 150 U. S. 653, cited in *Ferguson Contracting Co. v. Coal & C. R. Co.*, *supra*.) In that case it appeared that the defendant was a foreign corporation, created for the purpose of constructing and operating ships; its principal office was maintained abroad; it owned docks in the State of New Jersey, where its ships were loaded and unloaded, and it maintained in that State an office for the transaction of all business relating to its industrial operations. It further appeared that the firm of Kunhardt & Co., which had its own office in the State of New York, was the agent of the defendant corporation for its "usual monetary and financial transactions". This was held to be a sufficient manifestation of the presence of the defendant corporation in the State of New York to subject it to suit in that State.

At bar, the "particular business" for which the appellee was created, undoubtedly was the development of the natural resources of the Tennessee Valley. In order to accomplish this main object, the appellee, under the act of its creation, was expressly vested with numerous powers which, although incidental, were nevertheless essential for the accomplishment of its main object. In the exercise of the powers so granted to it, the appellee established various offices not only for the conduct of its chief business, but also for the transaction of incidental, yet essential, business in furtherance thereof. Indeed, despite the provision in the act of its creation requiring the appellee to maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama, it is a matter of common knowledge that the appellee actually maintains its principal place of business and its general headquarters in the State of Tennessee. (*Frahn v. Tennessee Valley Authority*, 41 Fed. Supp. 83.) It is thus evident that the appellee's Board, in the exercise of its administrative functions, saw fit for the convenience of its "business", to establish its general headquarters in the offices which it maintains in the State of Tennessee. The Board, likewise for the convenience of its "business", deemed it essential for the proper performance of its activities, to establish and maintain a permanent office in Washington. Its Washington office is located in the Woodward Building and consists of a suite of about six rooms with the name "Tennessee Valley Authority" on the door; its name appears on the building directory in the lobby; it is listed in the Washington telephone directory both in its own right and also in the portion of the directory in which there are listed the United States Government offices and agencies (Appellant's App. 18).

In determining whether the activities concededly conducted by the appellee in its Washington office are of such a nature as to warrant a finding that it is doing business within the District of Columbia, it is important to bear in mind that we are not dealing here with a private corpora-

tion. The "business" conducted by the appellee is not one essentially for profit. As a corporate agency of the United States, its activities presumably are for the benefit of the public. Its directors are subject to removal by both the Congress (Sec. 4(b); Appellee's App. 21)* and the President (Sec. 6; Appellee's App. 28)*. All legislation affecting its purposes and its powers emanates from the seat of the Federal Government in Washington. It must report annually to the President and to Congress (Sec. 9(a); Appellee's App. 29)*; the continuance of its activities is dependent upon appropriations granted by Congress (Sec. 27; Appellee's App. 56)*; the issuance of bonds by it must be with the approval of the Secretary of the Treasury (Secs. 15a, 15c; Appellee's App. 41-46)*; certain transfers and leases of realty must be approved by Congress and others by the President (Sec. 4(b), (c); Appellee's App. 23)*. Information required by Legislative Committees and others interested in the activities of the appellee, must be available in the appellee's Washington office (Appellant's App. 16). The appellee must utilize the services of various departments of the Government (Sec. 5(i); Appellee's App. 26),* the offices of which are maintained in Washington. The Executive and Legislative Departments of the Government must be consulted with respect to specific matters provided for in the act of its creation (Sec. 14; Appellee's App. 39-41).* The appellee's Board, its General Manager and other of its officials are frequently required to be in Washington on official business, and for that purpose the appellee's Washington office provides space, office services and information for the specific use of the appellee's managing officials (Appellant's App. 16).

The appellee's Washington office in making purchases from other Government agencies as the representative of its Materials Division, performs an essential and important function in direct furtherance of the appellee's business. The annual amount of such purchases does not appear in

* References are to sections of Tennessee Valley Authority Act of 1933.

the record, except that it is admitted that "a few *other small purchases* not exceeding a total of \$500 a year" are made (Appellant's App. 16).

It is also important to point out that the appellee as an instrumentality and agency of the Government of the United States, is expressly vested with the right of access to the Patent Office of the United States for the purpose of studying, ascertaining and copying all methods, formulae and scientific information necessary to enable the appellee to use and employ the most efficacious and economical processes for the production of nitrogen, fertilizer and hydro-electric power (Sec. 19; Appellee's App. 48).*

We can conceive of no more important activities which an instrumentality of the United States Government can perform within the District of Columbia than the activities actually carried on by the appellee. Assuredly, in maintaining a permanent office in Washington and in performing the functions summarized above, it has more than manifested its presence in the jurisdiction. It is, in fact, there.

The appellee argues in its brief (p. 14) that its purpose in maintaining an office in the District of Columbia is to facilitate the handling of its relationships with the Federal Government. Our reply to this argument is that the maintenance of the appellee's Washington office is essential for the accomplishment of its purposes and not merely to facilitate the handling of its relationships with the Federal Government. It is a depository of information not merely as a matter of facility, but because the act of its creation so provides: it utilizes the services of the Patent Office and other departments of the Government not as a matter of facility, but because it is directed so to do by the act of its creation; its Board of Directors, its General Manager and its other officials are necessarily required to consult with the Executive, Legislative and other Departments of the Government not merely as a matter of convenience or facility, but because the plain edict of the act of its creation so requires.

* References are to sections of Tennessee Valley Authority Act of 1933.

In the final analysis, the disposition of this appeal depends upon the answer which this Court must give to the question "Is the appellee doing business within the District of Columbia?" We urge that upon the conceded facts, the answer required is in the affirmative.

CONCLUSION

The judgment and order appealed from should be reversed and the motion denied.

Respectfully submitted,

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